LEMBAGA PEMEGANG AMANAH YAYASAN SABAH & ANOR *a*

v.

DATUK SYED KECHIK SYED MOHAMED & ANOR AND OTHER APPEALS

b

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPLICATION NO: S-08-327-99 & *c*
CIVIL APPEAL NOS: S-02-849-99, S-02-820-99, S-02-838-99
& S-02-848-99]
1 JUNE 2000

CIVIL PROCEDURE: *Amendment - Delay in applying for amendment - Timing of amendments - Whether application to amend an interlocutory matter or form part of trial - Whether separate notice of appeal need to be filed - Power to extend time to file notice of appeal - Rules of the Court of Appeal 1994, r. 12(a)* *d*

CIVIL PROCEDURE: *Amendment - Pleadings - Manner of drafting - Facts not evidence must be pleaded* *e*

The Court of Appeal had to deal with three applications filed by the respondents: (i) Application dated 15 December 1999 for leave to file a notice of appeal against the decision of High Court dated 7 April 1999 disallowing the respondents' application for leave to amend their re-amended statement of claim. The respondent took the stand that no separate notice of appeal was necessary as the dismissal of their application to amend was made at the trial and formed part of the judgment. As such, the application was not delayed since the judgment was delivered only on 6th September 1999; (ii) Application to amend the respondents' notices of cross-appeal by a plea of new cause of action and the joinder of action against a third party. The respondent contended that witness's testimony made it necessary to make the proposed amendments so as to meet the ends of justice; (iii) Notice of motion for leave to amend notices of cross-appeal to include further orders into the judge's original orders. *f* *g* *h*

Held:
Per Siti Norma Yaakob JCA

[1] (i) The original application to amend was in the form of a summons in chambers under O. 20 r. 5 of the Rules of the High Court 1980. The hearing was to be a chamber hearing and if an open court hearing was *i*

intended the respondents could have applied orally to have the matter argued in open court; (ii) The application to amend was an interlocutory matter and did not form part of the trial. Hence, the respondents had one month from 7 April 1999 within which to appeal but it was not done until 15 December 1999; (iii) The power to extend time or to give leave was discretionary in nature. It was necessary that the respondents placed before the court some relevant evidential material to explain the delay in filing the notice of appeal. This was not a proper case for the court to exercise its discretion.

[2] (i) The timing of the amendment should have been much earlier and not at the very late stage when closing submissions were about to be made. The court could not accept the explanation that the respondents had no sufficient time to compile notices of cross-appeal within the time limited by the Court of Appeal Rules to be a reasonably and satisfactory one; (ii) There would be no finality in the proceedings if the amendments were allowed since the need to amend only arose after the witness had testified; (iii) The claim by the respondents against the third party was already time barred under s. 3 of the Sabah Limitation Ordinance 1952.

[3] The proposed amendments should be drafted in short and simple sentences that could be readily understood. Furthermore, the proposed amendments in the instant case not only contained evidence but also submissions and inferences and these were highly improper as they offended the rules of pleading.

[Applications dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Mahkamah Rayuan mempertimbangkan tiga permohonan yang difailkan oleh responden-responden: (i) Permohonan bertarikh 15 Disember 1999 untuk kebenaran memfailkan satu notis rayuan terhadap keputusan Mahkamah Tinggi bertarikh 7 April 1999 tidak membenarkan permohonan responden-responden untuk mendapat kebenaran meminda pernyataan tuntutan terpinda mereka. Responden-responden berpendirian bahawa notis rayuan yang berasingan tidak diperlukan kerana penolakan permohonan mereka untuk meminda dibuat semasa perbicaraan dan menjadi sebahagian dari penghakiman. Dari itu, permohonan tersebut tidak lewat kerana penghakiman hanya dikeluarkan pada 6 September 1999; (ii) Permohonan untuk meminda notis rayuan balas responden kerana penambahan kausa tindakan yang baru dan percantuman kausa tindakan terhadap pihak ketiga. Responden-responden mendakwa bahawa testimoni saksi menjadikannya

perlu untuk membuat pindaan yang dicadangkan bagi mencapai keadilan; (iii) Notis usul untuk kebenaran meminda notis rayuan balas untuk memasukkan perintah-perintah lanjut kepada perintah hakim yang asal.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] (i) Permohonan asal untuk meminda adalah dalam bentuk saman dalam kamar dibawah A. 20 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980. Ianya didengar di dalam kamar dan jika inginkan perbicaraan di mahkamah terbuka, responden-responden bolehlah memohon secara lisan untuk perkara ini didengar di mahkamah terbuka; (ii) Permohonan untuk meminda adalah satu perkara interlokutori dan tidak menjadi sebahagian dari perbicaraan. Maka oleh yang demikian, responden-responden mempunyai masa selama satu bulan dari 7 April 1999 untuk merayu, akan tetapi rayuan tidak dibuat sehinggalah 15 Disember 1999; (iii) Kuasa untuk melanjutkan masa atau memberi kebenaran adalah perkara berkait dengan budibicara mahkamah. Adalah perlu bagi responden-responden mengemukakan kepada mahkamah keterangan material yang relevan untuk menjelaskan kelewatan dalam memfailkan notis rayuan. Ini bukanlah satu kes yang wajar bagi mahkamah menggunakan budibicaranya.

[2] (i) Mahkamah berpendapat bahawa masa pindaan patut dibuat haruslah lebih awal dan bukannya pada peringkat yang lewat ketika mana hujahan penutup hendak dibuat. Mahkamah tidak dapat menerima penjelasan bahawa responden-responden tidak mempunyai masa yang mencukupi untuk menyusun notis rayuan balas dalam jangkamasa terhad yang diperuntukkan dibawah Kaedah-Kaedah Mahkamah Rayuan sebagai satu penjelasan yang wajar dan memuaskan; (ii) Tidak terdapat kesudahan dalam prosiding jika pindaan dibenarkan kerana keperluan untuk meminda hanya timbul selepas saksi memberi keterangan; (iii) Dakwaan responden-responden terhadap pihak ketiga telah dibatasi had masa dibawah s. 3 Ordinan Had Masa Sabah 1952.

[3] Pindaan yang dicadangkan seharusnya dirangka dalam ayat-ayat yang pendek dan tidak rumit yang dapat difahami dengan senang. Namun begitu, pindaan yang dicadangkan di dalam kes semasa bukan sahaja mengandungi keterangan tetapi ianya juga mengandungi hujahan-hujahan dan inferens-inferens dan kesemua ini adalah sangat tidak wajar kerana ia bercanggah dengan peraturan-peraturan pliding.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871 ***(refd)***
Laird v. Briggs [1881] 16 Ch D 663 ***(dist)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(refd)***
Thong Kim Chea v. Thong Seng & Co Sdn Bhd & Anor [1996] 1 CLJ 153 ***(refd)***

Legislation reffered to:
Limitation Ordinance 1952 (Sabah), s. 3
Rules of the Court of Appeal 1994, rr. 8(1), 12(a)
Rules of the High Court 1980, O. 15 r. 6(2)(b)(i), O. 18 r. 7, O. 20 r. 5

For the appellants - John Cherryman QC (Douglas Lind & Desmond Liaw with him); M/s Skinner, Lind, Willie, Wong & Chin
For the respondents - Martin Mann QC (Alexander Decena & Norbett Yapp with him); M/s Jayasuria Kah & Co
For the State Government of Sabah - Juprin Wong-Adamal

Reported by Yow Ting Fong

JUDGMENT

Siti Norma Yaakob JCA:

Proceedings in the four consolidated appeals before us stem from the judgments delivered in two civil suits that were tried jointly in the court below. The two civil suits are Civil Suits 351/79 and 352/79 and two separate judgments from each suit dated 6 September 1999, and 10 September 1999, were entered against the appellants against which four separate notices of appeal were filed by them, two from Civil Suit 351/79 and two from Civil Suit 352/79. The respondents also filed two identical notices of cross-appeal against the judgment dated 6 September 1999, and two other identical notices of cross-appeal in respect of an order dated 7 April 1999, concerning the dismissal of their application to amend their pleadings in Civil Suit 352/79 to join Zara Sdn. Bhd. ("Zara") as the third defendant in that suit.

The parties have also filed between them seven separate notices of motion and at the outset of the trial we dealt with these applications first before hearing submissions on the merits of the appeals and cross appeals.

Two of such applications dated 2 February 2000, and 7 February 2000, were filed by the appellants and they seek to include a missing document at Part C, vol. 7 as p. 1965A, in the records of appeal as well as the certified true copies of the orders appealed against dated 6 September 1999, and 10 September 1999. Since the respondents had no objection to both applications we had allowed them on terms of the respective application.

There were also two identical applications both dated 25 April 2000, filed by the respondents to adduce fresh evidence by the admission of three affidavits affirmed by the appellants' witness, one Syed Salem Albukhary (SSA). Before us, Mr. Martin Mann, QC leading counsel for the respondents submitted that both applications have since become unnecessary and under those circumstances we had dismissed them with costs.

That left us with three more applications, all filed by the respondents and which prove to be very contentious. The first of such remaining applications dated 15 December 1999, is for leave to file a notice of appeal against the decision of the High Court dated 7 April 1999, disallowing the respondents' application for leave to amend their re-amended statement of claim dated 21 October 1998, in C.S. 352/79 to:

(1) add a new cause of action against the first appellant, Datuk Syed Kechik (DSK) and

(2) join Zara as a third defendant.

The first objection taken was on the form and nature of the application to amend in the court below as on this hinges the time factor when a dissatisfied party can appeal. The respondents maintain that despite the format used for the application and the proceedings that ensued, the application was intended to be argued in open court and form part of the proceedings in the trial as the application was made in the course of the trial. As such the application was not interlocutory in nature, it formed part and parcel of the trial and the time to appeal was after judgment had been delivered on 6 September 1999, and not after it was dismissed on 7 April 1999. Under those circumstances the respondents contend that no extension of time or leave to appeal is necessary based on the authority of *Laird v. Briggs* [1881] 16 Ch. D 663.

It is common ground that the application dated 5 April 1999, was filed during a break in the trial as between the period of 5 March 1999, to 8 April 1999, there was no sitting as the learned trial judge had to attend to the hearing of other matters of which he had been committed to and it also enabled leading counsel to attend to prior engagements outside Malaysia. The break too appeared to have suited both sides as it gave them the opportunity to prepare their closing submissions.

On 7 April 1999, a day before the resumption of the trial, the learned trial judge heard the application to amend. We pause here to look at the format of the application as filed in the court below.

The original application to amend was in the form of a summons in chambers under O. 20 r. 5 of the High Court Rules 1980 ("the Rules"). At the hearing corrections were made to the summons by Mr. Alexander Decena, counsel for the respondents to indicate that the application was made under O. 15 r. 6(2)(b)(i) of the Rules as well. Upon being told that the summons was not in order, Mr. Alexander Decena also applied orally to amend the application by specifying the gist of the amendments sought for in the summons but despite these corrections and amendments, the summons was still very much a summons in chambers. If indeed there was any doubt as to the nature of the application as amended this was put to rest by the opening words "LET ALL PARTIES concerned attend before the **judge in chambers** ..." (emphasis is ours). Clearly the hearing was to be a chamber hearing and if indeed an open court hearing was intended but the wrong form was issued, the respondents could have applied orally to have the matter argued in open court. But a perusal of the notes of proceedings recorded by the learned trial judge shows this was not so. Instead on the morning of 7 April 1999, Mr. Douglas Lind, junior counsel for the appellants applied for the matter to be adjourned to enable leading counsel, who was to arrive from the United Kingdom that evening, to argue it the next day. This was refused by the learned trial judge on the ground that junior counsel on both sides who have had the conduct of the proceedings, were equally capable of arguing the matter. It was under those circumstances that the learned trial judge heard the application in chambers and dismissed it with costs the same day. The order has also been drawn up and perfected on 15 April 1999, an exercise in which the respondents' solicitors had participated in with no untoward show of any objection.

Taking all matters into consideration it is our considered opinion that the application to amend was very much an interlocutory matter and did not form part of the trial and was correctly dealt with by the learned trial judge in his chambers. If indeed the amendments sought were intended to form part of the proceedings in the trial, there was no necessity to file any summons in chambers as the application could easily have been applied for orally in open court on the morning of 8 April 1999, when the court reconvened after the one month's recess. That was the manner in which amendments were sought for in *Laird v. Briggs (supra)* when at the trial, counsel for the defendant applied orally at the Bar for leave to amend the statement of defence. It was refused and it was held that under those circumstances the refusal formed part of the judgment and it was not necessary to appeal separately from it.

It is true that on the morning of 8 April 1999, Mr. Martin Mann, QC, leading counsel for the respondents did apply orally to the learned trial judge to have the application reheard again but this was refused and we say that such refusal does not alter the status of the application as it originated from a summons in chambers, a situation that was not present in *Laird v. Briggs (supra).*

Having held that their application is very much an interlocutory matter, the respondents had, under r. 12(a) of the Rules of the Court of Appeal 1994, ("CA Rules") one month from 7 April 1999, within which to appeal. This was not done until the instant notice of motion dated 15 December 1999, was filed, eight months later. The power to extend time or give leave is very much a discretionary matter and to enable us to exercise our discretion, it is necessary that the respondents place before us some relevant evidential material to explain the delay in filing the notice of appeal. See the decisions of this court in *Soh Keng Hian v. American International Assurance Co. Ltd.* [1996] 2 CLJ 449, and *Thong Kim Chea v. Thong Seng & Co. Sdn. Bhd. & Anor*. [1996] 1 CLJ 153.

The affidavit in support of the notice of motion does not contain any explanation for the delay and this is not surprising as the respondents had taken the stand that no separate notice of appeal is necessary as the dismissal of their application to amend was made at the trial and formed part of the judgment. As we cannot accept that contention and there has been an omission to give any satisfactory reason for the delay, we consider that this is not a proper case in which we should exercise our discretion to extend time. Under the circumstances we dismissed the notice of motion to amend the pleadings of Civil Suit 352/79, with costs for two counsel.

With the dismissal of the notice of motion for leave to amend, that would have resulted in the substantial amendments sought for by the respondents, being dismissed as well. But this is not to be as by an ingenius way, the amendments have resurfaced in a separate notice of motion also dated 15 December 1999, that seek to amend the respondents' two notices of cross-appeal against the same order refusing amendment dated 7 April 1999, by a plea of a new cause of action against DSK and the joinder of action against Zara in the same Civil Suit 352/79.

It is the respondents' contention that following the evidence of SSA, (who testified on behalf of DSK, who is too ill to testify) it has become necessary to make the proposed amendments so as to meet the ends of justice so that all issues are identified and properly argued before the court.

In the case of DSK, it is proposed to add a new cause of action against him by identifying a new fiduciary duty that was not pleaded before in the re-amended statement of claim dated 21 October 1998. The amendments appear in the proposed para. 8C in the re-amended statement of claim which sets out the added fiduciary duty owed by DSK to the first and second respondents and the breaches thereof at the proposed paras. 9A and 10A.

As for joining Zara as the third defendant, this is in line with SSA's admissions made during his testimony that:

(1) he orally misrepresented the actual management reserve area to be taken away from the twelve concessionaires by inflating the extent of such area as being more than adequate to fund the first respondent's project of building stadiums and sport complexes in all major towns in Sabah and by so doing justify Tun Mustapha's ("TM") action in "gifting away" an insignificant area of 40 sq. miles to the second appellant. This in brief is the gist of the amendments in the proposed paras. 14A, 14AB, 14AC and 14B of the re-amended statement of claim.

(2) Zara had received monetary benefits from the second appellant and under the circumstances Zara is a constructive trustee liable to account to the respondents. This is pleaded in the proposed paras. 15A and 15B. Such benefits include receipt of a sum of RM774,717.26 from the second appellant to fund Zara in the construction of the coastal highway, one of the matters raised in C.S. 351/79. There are also the admissions that other monetary benefits were made by the appellants to various persons and companies all connected to DSK and particularised in the proposed paras. 15AC(i), (ii), (iv)-(viii), of the re-amended statement of claim.

Finally consequent upon the aforesaid amendments, the respondents contend that the judgments dated 6 September 1999, and 10 September 1999, in Civil Suit 352/79 be varied by:

(1) substituting for the judgment sums therein a sum of not less than RM28,176,219 to be paid by the appellants to them with compound interest thereon at 8 per centum per annum to run from 1 January 1978, to date payment.

(2) ordering Zara on the evidence adduced to account to them:

(a) the sum of RM774,712.26 and such further sum not exceeding RM5,601,453.30 and

(b) compound interest on the two sums from 11 August 1976, until date of payment.

(3) alternatively ordering Zara to secure the payment of such sums, including interest from out of Zara's assets.

Objections to such amendments can be summarised into the following three headings.

(1) The nature of the amendments.

(2) The timing of the amendments.

(3) The effect of such amendments.

If indeed it is the contention of the respondents that the interests of justice would be met by allowing the proposed amendments so that all issues are identified and tried we consider that the timing of such a noble purpose should have been done much earlier and not at this very late stage when closing submissions were about to be made. As at 7 April 1999, when the amendments were refused that was the status of the trial in the court below. The respondents have explained that they were not able to compile comprehensive notices of cross-appeal any earlier as they had under r. 8(1) of the CA Rules ten days after service of the memorandum of appeal on them by the appellants within which to settle their notices of cross-appeal. Despite this they had taken the precaution of settling such notices in advance after they were served with the appellants' notices of appeal but their original notices of cross-appeal were not as comprehensive as they wanted them to be.

We cannot accept that explanation to be a reasonable and satisfactory one as being the reason for the delay as the proposed amendments as far as we can see are not dependant on the memorandum of appeal. We fully appreciate that the four consolidated appeals contain many complex issues and involved voluminous documents but this fact alone is no excuse for the failure of the respondents to settle their notices of cross-appeal within the time limited by the CA Rules. This is so as the need to amend only arose after SSA had testified on behalf of the appellants and if we allow such amendments under those circumstances it would mean that there will be no finality in the proceedings particularly when the amendments asked for by the respondents seek to introduce a new cause of action against DSK and to add a new party into the proceedings. Such amendments, we say, would involve reopening the trial again as the parties have to go back to the High Court for the new cause of action to be tried and the new party to be heard on its defence. This is not a very healthy and a happy prospect to look forward to as more time and money will have to be expended in an already dragging twenty year old matter. Added to this is the claim by the respondents that Zara hold all the monetary benefits given to them by

the appellants as a constructive trustee and liable to account, a cause of action that is already time barred under s. 3 of the Sabah Limitation Ordinance 1952, which under item 97 of the schedule to the Act prescribes a six year limitation period from the date the right to sue accrued. On the matter of limitation, Hashim Yeop A. Sani, CJ, Malaya, had this to say in the case of *Credit Corporation (M) Bhd. v. Fong Tak Sin* [1991] 2 CLJ 871.

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

The respondents are not without any remedy as armed with the favourable evidence adduced at the joint trial they can still proceed against DSK and Zara in fresh proceedings independently of the two civil suits filed in 1979.

For the aforesaid reasons and for the added reason that we had already refused leave to amend C.S. 352/79, we had also dismissed the respondents' notice of motion to amend the two notices of cross-appeal with costs for two counsel.

Finally we come to the respondents' last notice of motion also dated 15 December 1999, which is also for leave to amend their two notices of cross-appeal relating to the judgment dated 6 September 1999, in respect of C.S. 351/79. In the original notices of cross-appeal, the respondents object to the failure of the learned trial judge

(1) to order the second appellant to account to them the sum of RM10,375,504 on the additional ground of accessory liability.

(2) to award damages to the second and third respondents on the ground that DSK had an unlawful collateral purpose which led him to breach his fiduciary duties by committing the respondents to certain capital expenditure this being the construction of the Tower Block and the coastal highway for which the respondents suffered loss and damages.

Resulting from the aforesaid, the respondents contend that the judgment dated 6 September 1999, be varied to include the following orders as well.

(1) The second appellant account to them the sum of RM10,375,004 as an accessory and

(2) RM16.8 million and RM4.9 million be awarded to them as damages with interest thereon.

Clearly by their original notices of cross-appeal, the respondents seek to increase the judgment sum of RM10,375,004 by the further awards of other sums of money, which they claim they are entitled to based on the evidence as adduced.

In the proposed amended notices of cross-appeal, the respondents seek to further increase the judgment sum and the other sums stated in their original notices of cross-appeal by a further award for:

(1) the sum of RM13.27 million as equitable damages or compensation being the loss suffered by them measured in terms of the likely deficit in the value of the Tower Block and

(2) varying the judgment sum and substituting it for the sum of RM12,105,764 or such lesser sum being not less than RM8,277,227 based on the evidence adduced in the court below.

A draft of the proposed amended notices of cross-appeal has been attached by the respondents to their application and we must admit that our first reaction to the draft was one of utter disbelief and confusion. The grounds on which the respondents rely to support their application are pleaded in lengthy and complicated paragraphs and in particular ground A(1) is expressed in one long complicated sentence that make up 35 lines of typewritten words. If the intention of such amendments is to identify the issues to be argued before us, we can safely say that the manner in which the proposed amendments are presented to us fell short of our clear understanding of that intention. The proposed amendments could easily have been drafted in short and simple sentences that can readily be understood.

Another glaring instance that made the pleadings out of the ordinary is that evidence and not facts have been pleaded. It is a cardinal rule in civil proceedings that only facts need be pleaded. For this we rely on O. 18 r. 7 of the Rules that requires every pleading to contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which those facts are to be proved. The proposed amendments as drafted not only contain evidence but also submissions and inferences and this we say are highly improper as they offend the rules of pleading. On this ground alone, we could not allow such amendments and we accordingly dismissed the respondents' second notice of motion for leave to amend the two notices of cross-appeal with costs for two counsel.